In the Supreme Court of the

October Term

Algoma Net Company, Petitioner

v.

National Labor Relations

On Petition for a Writ of Certiorari
to the United States Circuit Court of Appeals
Circuit

Brief for the National Labor
in Opposition

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In the Supreme Court of the United States

OCTOBER TERM, 1941

No. 1256

ALGOMA NET COMPANY, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court below (R. 450–457) is reported in 124 F. (2d) 730. The findings of fact, conclusions of law, and order of the National Labor Relations Board (R. 83–100) are reported in 28 N. L. R. B. 64.

JURISDICTION

The decree of the court below (R. 462–464) was entered on January 3, 1942. The time for filing a petition for a writ of certiorari was extended

by orders of Mr. Justice Byrnes to May 3, 1942, to May 15, 1942, and finally to May 25, 1942 (R. 471–472). The petition for a writ of certiorari was filed on May 25, 1942. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, and under Section 10 (e) of the National Labor Relations Act.

QUESTIONS PRESENTED

1. Whether the National Labor Relations Board may proceed against a company, whose operations admittedly affect interstate commerce, after representatives of a state labor relations board have investigated similar charges against the same company and the latter board has failed to commence formal proceedings.

2. Whether the Board's finding that the petitioner violated Section 8 (1) of the Act should be set aside because it is based in part upon a patently threatening "open letter" addressed to a state labor relations board but distributed to the petitioner's employees.

3. Whether the Board erred in finding the petitioner to be responsible for the anti-union statements of a foreman who had power to recommend hiring and discharge.

4. Whether a finding of unfair labor practices is supported by substantial evidence where the record contains evidence which would also support a contrary finding.

5. Whether the Board abused its discretion in entering an order requiring petitioner to cease and desist from interfering in any manner with rights guaranteed by Section 7.

6. Whether the Board abused its discretion in entering an order requiring petitioner to reinstate employees who had engaged in minor misconduct.

7. Whether the Board abused its discretion in entering an order requiring petitioner to make whole the discharged employees notwithstanding that seventeen months intervened between the close of the hearing and the entry of the order.

8. Whether the Board abused its discretion in entering an order requiring petitioner to post notices that it will not engage in the conduct from which it has been ordered to cease and desist.

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act are set forth in the Appendix, *infra*, p. 19.

STATEMENT

Upon the usual proceedings, the Board issued its findings of fact, conclusions of law, and order (R. 83–100). The facts found by the Board and shown by the evidence may be summarized as follows:[1]

[1] In the following statement, the references preceding the semicolons are to the Board's findings and the succeeding references are to the supporting evidence.

Early in February 1939, one Kaus, an employee of petitioner, called a meeting of the employees for Saturday, February 4, 1939, to organize a union affiliated with the American Federation of Labor, herein called the Union (R. 86; 153–156). At that time J. C. Anderegg, petitioner's Vice-President and Superintendent, and Fisher, a foreman,[2] warned various employees that those attending the meeting would be discharged (R. 86–87; 193–194, 175, 169–170, 171, 265–266). On Monday, February 6, Kaus and employees Trainor and Ferron, who with Kaus had joined the Union and been elected a committee to solicit Union members, were laid off (R. 87; 156, 157, 168, 175, 194). On the same day Superintendent Anderegg distributed copies of a notice to the employees warning them (R. 88; 214, 270), "Don't make the same mistakes others made."

Although petitioner contended that the lay-offs were attributable to necessary curtailment of operations, it departed from its previous practice of giving preference to old and experienced employees (R. 89; 150–151, 203, 205–206, 216–217, 211, 239–240, 265), and retained employees considerably junior to Kaus, Trainor, and Ferron (R. 89; 271, 272, 274); moreover, on the following day petitioner hired a new employee and later

[2] J. C. Anderegg had power to hire and discharge; Foreman Fisher was authorized to recommend hire and discharge, and his recommendations were usually followed (R. 86; 104, 242).

transferred an inexperienced man to Kaus's position (R. 89–90; 141–142, 261–265, 274, Tr. 413–414).

On the day following their lay-off, Kaus, Trainor, and Ferron visited Plant A to solicit Union members (R. 90; 158, 195–196). Kaus secured permission to take the Plant B keys from Watchman Rasmussen [3] and went into Plant B (R. 90; 144–145, 158–159, 177–178). There he had an altercation with employee Lumaye. Lumaye's shirt was torn and he was bruised slightly on the chest (R. 90; 158–159, 206–108); there was some minor property damage (R. 90; 207, Tr. 888, 971). On February 8, Superintendent Anderegg learned of this incident (R. 90–91; 134–135, 206–207) and, without discussing it with either Kaus or the watchman, discharged Kaus for the alleged misconduct (R. 91; 210, 217–218, Tr. 441, 565).

Later the same day, Superintendent Anderegg met with Rauch, a representative of the Wisconsin Labor Relations Board, and Heymanns, a Union representative, to discuss charges that petitioner had violated the Wisconsin Labor Relations Act by laying off Kaus, Trainor, and Ferron (R. 91; 137–140). At a second conference held

[3] In view of Rasmussen's failure to testify despite his presence at the hearing, the Board refused credence to an unsigned written statement purportedly setting forth his report to E. W. Anderegg that Kaus had "stolen the key" (R. 90; 144–145, 124, 215, 219–220, Tr. 606–608, 632, 721–722, 157).

on February 9, Superintendent Anderegg agreed to reinstate Kaus on February 13, and to consider his lay-off from February 6 to 13 punishment for the assault. He also agreed to reinstate Trainor and Ferron within 20 days, or as soon as work was available, and to post a notice prepared by Rauch stating that petitioner would not interfere with the employees' rights to self-organization (R. 91; 140–141, 160, 198, 269). Petitioner reinstated Kaus on February 13 and posted the notice. On February 16 Rauch notified petitioner that in view of the settlement he would recommend withdrawal of the charges pending before the Wisconsin Board (R. 91; 141, 160–161, 273).

On February 20, General Manager E. W. Anderegg,[4] who had been on vacation, returned and received from Superintendent Anderegg a report of the foregoing occurrences (R. 92; 103, 104–105, 212). On February 21, Manager Anderegg, without interviewing Kaus, Trainor, or Ferron, ordered their discharge and locked out the 34 employees in Plant A until "further notice" (R. 92–93; 106–107, 114–115, 121, 272). He removed the notice prepared by Rauch and posted both an announcement stating in part that "no employee has to join a union unless he chooses" (R. 93–94; 110–111, 237, 270) and an "open letter" to the Wisconsin Board stating, *inter alia,* that an "out-

[4] The Board's decision inaccurately states that E. W. Anderegg is president of petitioner (R. 92). M. W. Perry is president, but he is inactive (Tr. 877–878).

side labor leader" and "racketeer"[5] had started labor trouble in the plant, that petitioner was "not going to let some outside element come in here and tear down [its] business * * *," that Plant A was being closed because of "present chaotic conditions," and would remain closed until there was a "show-down," and that petitioner was "going to nip [this] in the bud * * *" (R. 92–93; 107, 267–269).

On or about February 25, Hendricks, a second representative of the Wisconsin Labor Relations Board, conferred with petitioner (R. 94; 120, 146–147, Tr. 691). Manager Anderegg testified that Hendricks stated at the end of the conference, "I would forget about the whole thing just as if nothing had ever happened" (R. 94; 147). Manager Anderegg thereafter reopened Plant A on February 27, reinstating the 34 laid-off employees (R. 94). The Wisconsin Board took no further action.[6]

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[5] Manager Anderegg testified at the hearing that these epithets referred to union organizer Heymanns and to Wisconsin Board representative Rauch (*supra*, p. 5, R. 93; 137, 156, 227–228).

[6] Hendricks was not called as a witness at the hearing and the Board found (R. 94) that the record was not clear as to the meaning of his statement. No copy of the charges before the Wisconsin Board was introduced in evidence; the Board concluded that the record did not sustain petitioner's contention that the charges had been settled or dismissed by the Wisconsin Board and accordingly found it unnecessary to "consider the effect, if any, which a settlement or dismissal of the charges before the Wisconsin Board would have on the present proceeding" (*id.*).

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On or about March 18, Kamaroff, a representative of the National Labor Relations Board, discussed with Manager Anderegg charges filed on March 7 by the Union with the National Labor Relations Board (R. 94); Anderegg then agreed to reinstate Kaus, Trainor, and Ferron provided they made applications at his office (R. 94; 231–233). When they appeared, however, Manager Anderegg offered to consider reinstating them only if they would sign a written statement admitting that they had been discharged for misconduct (R. 94; 129–130, 179–180, 233–234). Manager Anderegg also took this occasion to warn the three employees that "if the union is going to run my business I took 25 years to build it up and there is nobody come in here—coming in here to tear it down" (R. 94; 163, 180).

The following day, Kaus, Trainor, and Ferron reported the results of the conference to Kamaroff, who telephoned Manager Anderegg and secured his agreement to reinstate the employees on their oral agreement to obey company rules (R. 94–95; 235). In accordance with Manager Anderegg's request that the three report to his office on March 20 (*ibid.*), Kamaroff telegraphed the men but they did not receive the message until March 21, at which time they reported to petitioner (R. 95; 164, 186–187). Manager Anderegg declined to reinstate them, stating "too late now—you went to those 2 racketeers from out of town before you

came into the office" (R. 95; 165, 181–182, 198, 232, 120, 121, 129, 131–132).[7]

The Board concluded that petitioner had engaged in unfair labor practices within the meaning of Section 8 (1) and (3) of the Act (R. 99). Its order requires petitioner (a) to cease and desist from its unfair labor practices and from in any manner interfering with the rights guaranteed in Section 7 of the Act; (b) to reinstate Kaus, Trainor, and Ferron; (c) to make whole Kaus, Trainor, and Ferron and the 34 employees who were locked out; and (d) to post appropriate notices (R. 99–100).

On May 31, 1941 (some two years after the charges were filed), the Board filed in the court below a petition for enforcement of its order (R. 442–447). On December 9, 1941, the court handed down its opinion (R. 450–456) and on January 3, 1942, entered its decree (R. 462–464), enforcing the Board's order in full.

ARGUMENT

1. Petitioner contends (Pet. 10, 20–25) that the Board was foreclosed from entertaining the charges and issuing its complaint because the Wisconsin Labor Relations Board had "concluded its administration and disposed of" the case. But as

[7] The Board found (R. 95) that Heymanns and Rauch (see note 5, *supra*, p. 7) were the "racketeers" here referred to.

the National Board's decision herein points out, there is no showing on this record that the Wisconsin Board had settled or dismissed the charges before it (*supra,* p. 7), so that the question of the effect which such action would have on the National Board's power is not presented. But if it were presented, it is clear that the National Board could not be foreclosed from acting by any prior action of the State Board, since Congress, acting within its constitutional authority, has provided in Section 10 (a) that the National Board's power to prevent unfair labor practices "shall be exclusive, and shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, code, law, or otherwise." Cf. *Consolidated Edison Co.* v. *National Labor Relations Board*, 305 U. S. 197, 222–224; compare *Cleveland etc. Ry.* v. *United States,* 275 U. S. 404, 412; *Northwestern Bell Telephone Co.* v. *Nebraska State Ry. Comm.*, 297 U. S. 471, 479; *National Labor Relations Board* v. *Bachelder,* 120 F. (2d) 574, 576 (C. C. A. 7), certiorari denied, 314 U. S. 647.

2. Petitioner contends (Pet. 10–11, 25–26) that the Board erred in finding that petitioner's open letter of February 21 (R. 92–93, *supra,* pp. 6–7) violated Section 8 (1) of the Act (R. 97). The finding was proper. The letter declared that petitioner was locking out its employees because of the Union's efforts to organize them, threatened

to keep Plant A closed until there was a "show down," and stated that the Company would go out of business if an "outside element" came into the situation. There is no conflict with *National Labor Relations Board* v. *Virginia Electric & Power Co.*, 314 U. S. 469. The Board's conclusion that the open letter was coercive was, as the decision makes clear (R. 96), "based on the totality of the Company's activities during the period in question" (*id.*, at p. 477).[8] Moreover, disregarding the letter, the Board's findings that Section 8 (1) and (3) was violated are adequately supported by other evidence.

3. Petitioner's claim (Pet. 11–12, 26–27) that the Board and the court below erred in holding petitioner responsible for the antiunion statements of Foreman Fisher is immaterial. The evidence establishes (Statement, pp. 4–9) that petitioner, through its manager and its vice president, engaged in conduct clearly violating Section 8 (1) and 8 (3). This evidence, quite apart from

[8] Nor is there conflict, as petitioner asserts, with a group of decisions in other cases in the circuit courts of appeals (Pet. 11, 25–26). The cases turned upon their particular facts. None of them holds that statements of an employer which are in fact coercive or intimidating do not constitute unfair labor practices. See the Board's briefs in opposition in *North Electric Mfg. Co.* v. *National Labor Relations Board*, No. 931, this Term, pp. 9–12, certiorari denied, March 16, 1942; and *Norristown Box Co.* v. *National Labor Relations Board*, No. 993, this Term, pp. 11–13, certiorari denied, April 13, 1942.

Fisher's statements, fully supports the Board's order. Moreover, petitioner's claim is without merit. Fisher was a foreman whose recommendations as to hiring and discharge were usually followed (*supra*, p. 4, note 2). Petitioner is responsible for the antiunion conduct of such a supervisor. *International Association of Machinists* v. *National Labor Relations Board*, 311 U. S. 72; *H. J. Heinz Co.* v. *National Labor Relations Board*, 311 U. S. 514; *National Labor Relations Board* v. *Link-Belt Co.*, 311 U. S. 584.[9]

4. Petitioner's contention (Pet. 12–13, 27) that the Board may not properly find that an unfair labor practice has been committed where the record contains evidence which would also support a contrary finding is answered by *National Labor Relations Board* v. *Nevada Consolidated Copper Corp.*, No. 774, this Term, decided April 27, 1942, reversing 122 F. (2d) 587 (C. C. A. 10).[10]

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[9] *National Labor Relations Board* v. *Sands Mfg. Co.*, 306 U. S. 332, cited by petitioner (Pet. 12), is not in point. Petitioner's claim of conflict with various decisions of the circuit courts of appeals (Pet. 12), even were it well-founded, does not call for review; this Court will not review a decision which is in accord with the controlling decisions of this Court merely because of the "conflict" created by other earlier lower court decisions which may have applied principles contrary to those subsequently declared by this Court.

[10] *Bussmann Mfg. Co.* v. *National Labor Relations Board*, 111 F. (2d) 783 (C. C. A. 8), cited by petitioner (Pet. 13), was relied on by the lower court in the *Nevada Consolidated* case (122 F. (2d), at 595). In its brief in this Court, the Board pointed out that the *Bussmann* case had applied the

5. Petitioner urges (Pet. 13–14, 27–28) that the provision of the order which restrains petitioner from in any manner infringing the rights guaranteed in Section 7 of the Act is invalid under the principles enunciated in *National Labor Relations Board* v. *Express Publishing Co.*, 312 U. S. 426. But in the *Express* case, this Court recognized that the "breadth of the order * * * must depend upon the circumstances of each case" (312 U. S., at 436). In that case there was only an isolated refusal to bargain collectively. In this case there is proof of numerous independent violations of Section 8 (1) which were of the same type as the order prohibits. This circumstance of itself suffices to support the order. Moreover, in this case the violations were so numerous and so varied and were committed with such open hostility to the Union as to furnish ample basis to believe that other violations might occur unless restrained—a second sufficient ground for the broad type of order. Provisions like the one here in controversy were enforced in *National Labor Relations Board* v. *Automotive Maintenance Machinery Co.*, No. 188, this Term, decided February 16, 1942; *National Labor Relations Board* v. *Electric Vacuum Cleaner Co.*, No. 588, this Term, decided March 30, 1942; and *National Labor Re-*

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same mistaken principle as had the lower court in the *Nevada Consolidated* case. Brief for the National Labor Relations Board, No. 774, this Term, p. 46.

lations Board v. *Nevada Consolidated Copper Corp.*, No. 774, this Term, decided April 27, 1942. Contentions similar to that raised by petitioner were raised by the employers in *Owens-Illinois Glass Co.* v. *National Labor Relations Board*, No. 985, this Term, certiorari denied, April 6, 1942; and *Wilson & Co.* v. *National Labor Relations Board*, No. 1189, this Term, certiorari denied, June 1, 1942.[11]

6. Petitioner's contention (Pet. 14–15, 28–29) that it was improper for the Board to direct reinstatement of the three employees involved because they had violated the criminal statutes of Wisconsin and the company's rules assumes a set of facts (Pet. 3–4) differing from the concurrent findings of the Board and the court below (R. 90, 454–455).[12] Furthermore, even on the assumed facts, the misconduct which petitioner alleges is much less serious, both quantitatively and qualitatively, than the misconduct held to bar rein-

[11] Inasmuch as the instant decision is clearly in accord with the *Express* case, petitioner's claim of conflict with various lower court decisions (Pet. 13–14) is immaterial even if true. Cf. p. 12, note 9, *supra*. Furthermore, the claim does not appear to be well-founded, for the cited decisions turned upon their facts.

[12] Petitioner would have this Court assume that the criminal statutes were violated. It does not appear that charges were at any time preferred against the employees, or that they were ever arrested, tried, or convicted of any offense.

statement in *National Labor Relations Board* v. *Fansteel Metallurgical Corp.*, 306 U. S. 240, and *Southern Steamship Co.* v. *National Labor Relations Board*, No. 320, this Term, decided April 6, 1942. The Circuit Courts of Appeals have uniformly held that the *Fansteel* decision does not require the Board to deny the normal remedy of reinstatement to employees who engage in the fisticuffs and other minor misconduct which are often the accompaniment of labor disputes.[13] In this case petitioner itself showed that it did not regard the misconduct of the employees as serious by twice offering to reinstate them (see pp. 6, 8, *supra*).

7. Petitioner contends (Pet. 15, 29–30) that the back-pay order should be modified because some 17 months elapsed between the close of the origi-

[13] *National Labor Relations Board* v. *Reed & Prince Mfg. Co.*, 118 F. (2d) 874, 888 (C. C. A. 1), certiorari denied, 313 U. S. 595; *National Labor Relations Board* v. *American Mfg. Co.*, 106 F. (2d) 61, 68 (C. C. A. 2), modified and affirmed, 309 U. S. 629; *National Labor Relations Board* v. *Stackpole Carbon Co.*, 105 F. (2d) 167, 176 (C. C. A. 3), certiorari denied, 308 U. S. 605; *Republic Steel Corp.* v. *National Labor Relations Board*, 107 F. (2d) 472, 479 (C. C. A. 3), certiorari denied on this point, 309 U. S. 684; *National Labor Relations Board* v. *Colten*, 105 F. (2d) 179, 183 (C. C. A. 6); Note, *Employee Misconduct Under The Wagner Act; Developments Since The Fansteel Case*, 39 Col. L. Rev. 1369.

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nal hearing and the issuance of the Board's decision,[14] and because another six months elapsed before the Board filed a petition for enforcement. As to the latter period, the short answer is that petitioner was free at any time to file a petition for review under Section 10 (f) of the Act. As to the former period, petitioner makes no showing that the delay was unreasonable nor does it assign any reason why the burden of delay should be thrust upon the innocent employees rather than upon petitioner whose wrongdoing is the root of the situation. Petitioner's claim is of a type which has been uniformly rejected. See, *e. g.*, *Phelps Dodge Corp.* v. *National Labor Relations Board,* 313 U. S. 177, affirming in this respect 113 F. (2d) 202 (C. C. A. 2); *National Labor Relations Board* v. *Electric Vacuum Cleaner Co.,* No. 588, this Term, decided March 30, 1942.[15] More-

[14] The delay is attributable, in part, to the fact that after petitioner had filed exceptions to the examiner's intermediate report based upon the evidence taken at the original hearing, petitioner filed two applications for leave to take additional evidence, which the Board granted. The Board's decision issued less than 4 months after the close of the final hearing (R. 84–85).

[15] See, also, *National Labor Relations Board* v. *Isthmian Steamship Co.*, 126 F. (2d) 598 (C. C. A. 2); *National Labor Relations Board* v. *Wilson Line, Inc.*, 122 F. (2d) 809 (C. C. A. 3); *Triplex Screw Co.* v. *National Labor Relations*

over, the defense of laches is not available in a proceeding brought by an agency of the federal government. *Chesapeake & Delaware Canal Co.* v. *United States,* 250 U. S. 123; *Board of Commissioners* v. *United States,* 308 U. S. 343.

8. The provisions in the order which require the petitioner to post notices that it will not engage in conduct from which it has been ordered to cease and desist are in the form usually used by the Board. Similar provisions have been approved by this Court (*National Labor Relations Board* v. *Express Publishing Co.,* 312 U. S. 426, 438–439), and have uniformly been enforced by this Court and the circuit courts of appeals.[16]

Board, 117 F. (2d) 858 (C. C. A. 6); *National Labor Relations Board* v. *Superior Tanning Co.*, 117 F. (2d) 881 (C. C. A. 7), certiorari denied, 313 U. S. 559; *National Labor Relations Board* v. *Aluminum Products Co.*, 120 F. (2d) 567 (C. C. A. 7); *National Labor Relations Board* v. *Bachelder*, 120 F. (2d) 574 (C. C. A. 7), certiorari denied, 314 U. S. 647. The case of *National Labor Relations Board* v. *Mall Tool Co.*, 119 F. (2d) 700 (C. C. A. 7), cited by petitioner (Pet. 15), involved a wholly different situation, i. e., unexcused delay on the part of discharged employees in filing charges with the Board.

[16] *National Labor Relations Board* v. *A. S. Abell Co.*, 97 F. (2d) 951 (C. C. A. 4), and *National Labor Relations Board* v. *Louisville Refining Co.*, 102 F. (2d) 678 (C. C. A. 6), cited by petitioner (Pet. 15–16), dealt with a different form of notice which the Board no longer uses.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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